



2001

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7 *Clinical L. Rev.* 287-306 (2001)

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March 2010

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PROVOCATEURS FOR JUSTICE

JANE H. AIKEN*

Clinical legal education offers unique opportunities to inspire law students to commit to justice. Merely providing a justice experience is not enough. We must provoke a desire to do justice in our students. As provocateurs, we determine where our students are in the developmental process toward "justice readiness." This article outlines those developmental stages and suggests interventions to assist students in their transition from stage to stage. Being "justice ready" requires sensitivity to the ways in which assumptions color all aspects of our cases. The article closes with suggestions and examples of how to critically reflect on assumptions that hinder social justice.

INTRODUCTION

Clinical legal education offers students direct experience as lawyers working for social justice. Students learn about justice through the practice of poverty law; they bring justice to under-served communities by meeting essential legal needs; they affect systemic justice through strategic use of civil rights actions.¹ In short, students play significant roles in delivering justice. Nevertheless, I am not at all sure that I am teaching enough about justice by merely ensuring that my students experience the fight for it.

A "justice experience" is too often like that trip to Paris: it was an exciting trip that one occasionally reflects upon and that provides fodder for good stories. It makes me interesting but not a Parisian. Mere exposure to substance is insufficient to train good lawyers. Relying on pure case-handling as the medium in which we teach about justice reflects a belief that we communicate values through our content choices rather than by engaging the student in the moral and ethical

* Professor of Law, Washington University School of Law. I wish to thank Jon Dubin for asking me to participate in the Rutgers Conference, and Washington University School of Law and the Carnegie Foundation for the financial support for the research. Thanks also are in order for Stephen Wizner who looked at several drafts, Dennis Curtis, Kathy Hessler, Catherine Klein, Abbe Smith, Ellen Scully, Margaret Barry, Marie Kenyon, Jean Koh Peters, and my colleagues Katherine Goldwasser, Peter Joy, Maxine Lipeles and Karen Tokarz. Much of this article is inspired by my work with the Carnegie Academy for the Scholarship of Teaching and Learning. In particular, I would like to thank my working group, Catherine White Berheide, Dan Bernstein, Hessel Bouma, Jaime Diaz, JoLaine Reiersen Draugalis, Andrea Johnson, Craig Nelson, and Deirdre Royster.

¹ It takes merely a glance at Frank Askin's article, *A Law School Where Students Don't Just Learn the Law; They Help Make the Law*, 51 RUTGERS L. REV. 855 (1999), to see how effective a clinic can be in law reform.

discourse about those choices. In the excitement and the constancy of the lawyering, we sometimes view ourselves as “providers of apprenticeships.” Many of us would rather describe ourselves as teachers dedicated to justice.² If we truly are going to fulfill our justice mission, we must determine what skills and content make our students more likely to be able to identify injustice and develop teaching interventions that will increase the probability that our students will acquire those skills.

I aspire to be a provocateur for justice.³ A provocateur is one who instigates, a person who inspires others to action. A provocateur for justice actively imbues her students with a lifelong learning about justice, prompts them to name injustice, to recognize the role they may play in the perpetuation of injustice and to work toward a legal solution to that injustice. This article attempts to identify ways in which clinicians can be provocateurs. What kinds of interventions with students can make this happen? Are there particular kinds of cases that make such interventions more potent? How do we relate to our students as peers and experts in order to maximize the chance that they will be faithful trustees of justice?⁴ How do we teach students to recognize injustice when they see it, engage in meaningful analysis of the causes and potential cures for that injustice, and develop an abiding desire to use their legal skills to ensure that justice is done? How do we do this and still accomplish other pedagogical goals?

One of the special problems that clinicians face is the urge to try to do it all – often within the space of one semester of law school. We want our students to come away from the clinic with a more varied understanding of what it means to be a lawyer serving a client, with strong lawyering skills including negotiation, counseling, interviewing, and fact investigation. We hope to give them opportunities to develop their trial preparation and presentation of evidence skills and to gain an understanding of effective legal writing. On top of this, we want to

² Some of us think of ourselves as lawyers rather than teachers. And we are such good lawyers! We are so fortunate to have institutions that support our work and therefore allow us to work in the fight for justice without charge. We all measure our lives by how much we accomplish, telling stories about the cases that changed people’s lives. We all bask in each other’s successes as a way to refuel, to affirm we are fighting the good fight, to participate in the “in-group.” Our rewards are often few but are all but made up by the satisfaction (and sometimes smug superiority) we feel in doing the work we do. It is hard to remember when I am creating opportunities for doing justice that I am a teacher first, before I am a lawyer. It is when I remember this that I sense my satisfaction flag a bit. I think I am a much better lawyer than I am a teacher.

³ Jack Mezirow describes “the empathic provocateur and role model, a collaborative learner who is critically self-reflective and encourages others to consider alternative perspectives. . .” JACK MEZIROW, *TRANSFORMATIVE DIMENSIONS OF ADULT LEARNING* 206 (1991).

⁴ I thank Stephen Wizner for the concept that we are “trustees of justice.”

expose our students to the deep injustices of poverty and abuse of power. We want to instill in them an abiding desire to use their legal skills to remedy these injustices and the wisdom to know the limitations of the legal system in effectuating comprehensive change in the conditions within which they operate. Needless to say, this is a set-up for failure.

Most of us have learned that we cannot do it all. Most of us have recognized that we cannot expect our students to leave our clinics with well-developed client and litigation skills. Instead we have developed teaching interventions that attempt to identify what the student's level of skill is and provide opportunities to improve. We have learned that if we can teach students, at best, how to reflect on their experience, engage in meaningful self-criticism and learn lessons on their own, then we have accomplished a great deal. We have launched the student on his way toward being that skillful lawyer we would like to produce. I think that this goal is a reasonable one, one that meets our students where they are, one that empowers them and at the same time, realistically reflects what we can do as teachers in that one semester course in clinic. I take comfort in understanding my limitations in training students in the technical skills of lawyering. It is a sign of my maturity. More importantly, I believe that operating with an awareness of this limitation has made me a much more effective teacher.

This article advocates a similar approach to our social justice agenda in the clinic. It is time we recognize that our success as social justice educators is not determined by how many Thurgood Marshalls or Marion Wright Edelmans we produce. We would be far better off if our students learned how to reflect on their experience, place it in a social justice context, glimpse the strong relationship between knowledge, culture and power, and recognize the role they play in either unearthing hierarchical and oppressive systems of power or challenging such structures. I call this "justice readiness." If we can move our students toward "justice readiness" through their clinical experience, then we should count that as success. It is then up to them what choices they make about the kind of lawyers they want to be. We have pulled back the curtain and dethroned neutrality.

Just as with differing levels of lawyering skills, our students come to us with differing awareness of social justice and differing levels of commitment. Our job is to become effective diagnosticians of our students' "justice readiness" and to employ a wide range of interventions that will enhance the likelihood that they will appreciate the role they play in promoting or inhibiting justice as they act as lawyers.

Therefore, this article is divided into two parts. First, I garner

information from educational theorists on moral development and the evolution of higher order thinking skills. I translate these theories into a diagnostic mechanism for determining our students' "justice readiness." Then I discuss the process of critical reflection: a long-used technique for clinical teachers. At heart, critical reflection is the ability to identify and expose assumptions. Long-held but incorrect assumptions often stand in the way of real personal and political change. The ability to identify these assumptions in oneself and translate them into legal claims are key skills for a lawyer committed to social justice. The article closes with practical teaching tips and examples of ways to develop these justice insights.

"JUSTICE READINESS": A DEVELOPMENTAL APPROACH

The first step in moving our students toward a commitment to justice is for teachers to understand that the ability to recognize injustice and participate in creative solutions involves a developmental process that usually occurs in sequence. First, a student must develop effective critical thinking skills. Critical thinking in the law is the ability to see that law is constructed rather than discovered. The law does not exist "out there" to be found; rather it is a reflection of a complex interplay of information, expertise, and value choice. Being "justice ready" takes critical thinking one step further: the student sees that she can play an active role in exposing the inherent biases in law. She can use that understanding to construct legal challenges that will enhance human dignity and move toward a more just society. As teachers we can become competent diagnosticians of where our students fall within the developmental sequence and foster movement toward "justice readiness."⁵

Students come to us at varying stages in the development of critical thinking skills that require different interventions. Educational theorists have identified several developmental stages for adult learners,⁶ which I present in a legal context. First, the learner manifests

⁵ Craig Nelson, *On the Persistence of Unicorns: The Tradeoff Between Content and Critical Thinking Revisited*, in *THE SOCIAL WORLDS OF HIGHER EDUCATION* 168 (Pescosolido & Aminzade eds., 1999). Nelson suggests that teachers must foster the sequential transitions. *Id.* at 177.

⁶ See, e.g., MICHAEL BASSECHES, *DIALECTICAL THINKING AND ADULT DEVELOPMENT* (1984); MARCIA B. BAXTER MAGOLDA, *KNOWING AND REASONING IN COLLEGE, GENDER-RELATED PATTERNS IN STUDENTS' INTELLECTUAL DEVELOPMENT* (1992); MARCIA B. BAXTER MAGOLDA, *CREATING CONTEXTS FOR LEARNING AND SELF-AUTHORSHIP: CONSTRUCTIVE DEVELOPMENTAL PEDAGOGY* (1999); MARY BELENKY, BLYTHE CLINCHY, NANCY GOLDBERGER, & JILL TARULE, *WOMEN'S WAYS OF KNOWING* (1986); NANCY J. EVANS, DEANNA S. FORNEY & FLORENCE GUIDO-DIBRITTO, *STUDENT DEVELOPMENT IN COLLEGE: THEORY, RESEARCH AND PRACTICE* (1998); ROBERT KEGAN, *OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE* (1994); PATRICIA M. KING & KAREN

right-wrong dualist thinking. At this stage, students still hang on to the idea that there is a right and wrong answer to every legal problem. The lawyer's job is to find that answer. In the second stage of development, critical thinking, the learner recognizes that there are very few or no absolute answers to legal problems. Law students at this stage believe that there is absolutely no certainty in the law. The lawyer's job is to figure out what the decision-maker wants and pitch legal arguments that appeal to the decision-maker. These students understand the important developmental step that the law is "constructed," but they feel powerless in their ability to make change. In the final stage of a lawyer's development toward "justice readiness," the lawyer demonstrates an appreciation for context, understands that legal decision-making reflects the value system in which it operates, and can adapt, evaluate, and support her own analysis. At this stage, the "justice ready" lawyer can become proactive in shaping legal disputes with an eye toward social justice.

Stage One: Dualistic Right-Wrong Thinking

The first stage of intellectual development, right-wrong dualism, is very familiar to legal educators. Students often begin their legal education with the idea that they are learning the "facts" of law.⁷ The role of the law professor is to be the "authority" who conveys to the student the "truth." Students believe that once they know what the law/truth is, they can apply it and act as lawyers. Students believe that this is what we mean when we say we are training them to "think like lawyers." If one applies precedent from similar fact situations to current facts, then one can arrive at an "answer" or argument that is likely to be persuasive to a court. "Thinking like a lawyer" suggests that the lawyer's own values play no role in the analysis, that the process is neutral. This inculcated belief in the possibility of neutrality ensures the triumph of the status quo. Indeed, students coming from traditional law school courses are often imbued with values that promote established economic and social interests. The students themselves are often unaware of this inculcation.

STROM KITCHNER, *DEVELOPING REFLEXIVE JUDGMENT: UNDERSTANDING AND PROMOTING INTELLECTUAL GROWTH AND CRITICAL THINKING IN ADOLESCENTS AND ADULTS* (1994); WILLIAM G. PERRY, JR., *FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS, A SCHEME* (1998).

⁷ WILLIAM G. PERRY, *FORMS OF ETHICAL AND INTELLECTUAL DEVELOPMENT IN THE COLLEGE YEARS: A SCHEME* 66 (1999). Perry has developed a complex understanding of the development of critical thinking in adult learners. My interpretation of Perry into a legal education context is far less sophisticated and truncated. My apologies to Perry. Nevertheless, I find his insights remarkably cogent and useful for law teachers and hope that I have done them a bit of justice.

It is the student's understanding that legal knowledge does not exist "out there" for the student willing to do enough research that indicates an ability to think critically, to understand that what we know is a complex interplay of information, experience, power and culture. In order to become "justice ready," students must also be able to apply their critical skills and understand that decisions are "contextual, as based inevitably on approximations, as involving trade-offs among conflicting values, and as requiring that we take stands and actively seek to make the world a better place."⁸

Usually by the time we see students in our clinics, they have abandoned this right-wrong dualist approach. Students learn early on that they are not learning "black letter" law, but the ability to make persuasive arguments. For the students who do arrive in our clinics at this stage, we should be satisfied if we begin to undermine their conviction that the playing field is level. One way is to reveal the contradictions of poverty and the ways in which justice is denied when the person seeking it has no money.⁹ Once they encounter a client, the blind faith that there is a "truth" or a "law" that can be applied must give way to a more sophisticated understanding. Clients' cases rarely present simple facts that lend themselves to right or wrong answers. It is the complexity and unpredictability of working with real people that makes clinical legal education so rich.

A student who is grounded in a dualistic right-wrong perspective and is always looking for the "answer" needs clinical opportunities in which she must cope with a great deal of uncertainty in the law. Through that experience she will be able to learn that the law is rarely prescriptive. At this level of thinking, the learner looks to authority for the "right answers." Therefore, we should maximize the student's ability to make independent decisions, rather than to provide her with "answers." Of course, with a student who resists thinking for herself, it is often difficult to allow independent decision-making for a client. We can, however, focus our feedback on the student's lack of comfort in coming to decisions and assist her in learning to appreciate the contextual complexities for which there is no "right" answer. We cannot expect our students to embrace a justice agenda if they do not understand the degree to which power and privilege affect how law is created and enforced.¹⁰ Understanding that legal issues are grounded in

⁸ Nelson, *supra* note 5, at 177.

⁹ Stephen Wizner, *Book Review: Cases and Materials on Law and Poverty*, 70 COLUM. L. REV. 1305, 1309 (1970) ("A study of social problems, however, entails a criticism of the established institutions and a questioning of the official ideology. The politics, values, and explanations of the reality of the law of the affluent seem tenuous when viewed from the perspective of the poor.")

¹⁰ For insight into theories of social justice education, see PETER MAYO, GRAMSCI,

decisions about what we value, what we believe matters, permits students to understand that they must choose what to value when they practice law. They cannot avoid the choice. Students modify their idea that there are right and wrong answers for everything when they are required to accommodate those situations where there are multiple solutions to a problem or the possibility of uncertainty.

Stage Two: Critical Thinking

In clinic, we rarely encounter the student who believes that the law is a collection of rules that, once known, can be applied to any situation and an answer discerned. Instead, we are more likely to encounter the student at the next stage of intellectual development as a lawyer: the beginning stages of critical thinking. These students no longer believe that the law is determined, but they are relativists regarding justice. At this stage, critical thinkers manifest a belief that there are a multiplicity of options, but believe that the lawyer is powerless to shape the outcome except through "playing the game." We can move them along toward "justice readiness" by helping them realize that they are themselves a source of knowledge and authority.

In law, the recognition that there are multiple approaches to a legal problem usually occurs in the first year, when students recognize that when applying precedent, one must choose which precedent to apply and, based on the facts of the case, argue appropriate outcomes. Despite the fact that students are beginning to be able to identify cases on the margins and the ways in which arguments can be made for either party in a case, they frequently take the position that there is no nonarbitrary basis for determining what is right. Law school reinforces this "relativism" by teaching students that the right outcome will result from the efficient functioning of the adversary system.¹¹ In the educational setting, students begin to think of their task as figuring out the "teacher's games,"¹² that is, reflecting back on exams what they believe the teacher wants to hear as the "right" answer. Many students remain at that level of thinking about the law, taking essentially a "hired gun" approach to what it means to be a lawyer. If any opinion can be just as valid as any other opinion, it is not surprising that the law appears chaotic and lacking in principle to students at this stage of intellectual development.

FRIERE & ADULT EDUCATION: POSSIBILITIES FOR TRANSFORMATIVE ACTION (1999); SOCIAL THEORY: THE MULTICULTURAL AND CLASSIC READINGS (Charles Lemert ed., 1999); and TEACHING FOR DIVERSITY AND SOCIAL JUSTICE (Maurianne Adams, Lee Anne Bell & Pat Griffin eds., 1997).

¹¹ Whatever that means. We often hear this said but really never give content to "efficient functioning."

¹² Nelson, *supra* note 5, at 173.

One way to move the student at this stage toward “justice readiness” is to structure their learning experience so that they have cases that require creative solutions to clients’ problems. Cases that require the student to create causes of action or legal remedies otherwise unavailable might be appropriate. The fact that there is no “outside authority” from which to draw a remedy may force the student to draw from her own knowledge base and to draw connections based on context. These challenges require the student to assert his own values and not merely echo the law’s authority. Such cases are not so rare: the gay partnership that needs legally created “familial protections” that are not available if relying on the default protection of the law; the battered woman/parent who needs her seemingly acquiescing behavior translated into a reasonable coping response to the violence in her life; the civil rights challenge that transforms a factual situation into something that arguably can be redressed under the law. There is no shortage of opportunities for students to face the fact that they cannot rely on “the way things are” and meet the needs of their clients. Reliance on authority may work unfair results for the client. Our choice of cases also allows the teacher to be a role model by demonstrating a lawyer taking a stand grounded in values despite uncertainty and complexity.¹³

The critical thinker must recognize herself as a legitimate source of knowledge along with authorities, such as the teacher or case law and statute. Much of clinical education is set up to give the students the responsibility for cases and inspire this kind of development. In the clinic, a student encounters raw facts from which she must determine if there is a cause of action and the relevance of the available facts. She must gather enough information and experience so as to be able to have sufficient expertise to counsel a client meaningfully about possible outcomes. In the clinic, the learner is given the autonomy and the responsibility to make critical decisions in handling clients’ cases. These experiences, enhanced by skillful supervisors, reinforce higher-level learning. A student who has reached this level of thinking recognizes that legal problems can be approached from diverse frameworks, is able to identify the costs and benefits of embracing a particular approach, can identify the reason for choosing one framework over another and takes responsibility for her beliefs and their impact on the world.¹⁴ Students demonstrate higher-level critical

¹³ *Id.* at 176.

¹⁴ Very few people achieve this level of critical thinking, but clearly it should be a major goal of a legal education. As Nelson puts it: “[We need] minds that can grapple successfully with uncertainty, complexity, and conflicting perspectives and still take stands that are based on evidence, analysis, and compassion and are deeply centered in values.” *Id.* at 177.

thinking skills when they develop a sense of themselves as experts, can evaluate strategies for coping with problems and make choices and judgments.¹⁵ If we are successful in bringing the student to a realization of her own power to shape the law to achieve justice, we have brought her to the threshold of “justice readiness.” All too often we leave our students there: poised and ready, but not committed. That is the trip to Paris. As provocateurs for justice, we can usher them through that door and support them in actually making a commitment to justice.

Stage Three: Justice Readiness

Once our students develop this appreciation for the role values play in the justice system, we can help them identify that they can play a role in the delivery of justice and teach them ways in which they can mediate their actions and values through that identity.¹⁶ Teaching an appreciation of and desire to do justice focuses on a process.¹⁷ That process is one step beyond critical thinking to becoming “justice ready.” One educational theorist calls this the development of “critical consciousness.”¹⁸ A provocateur for justice assists in the development of this “critical consciousness.” It is a difficult and complex task.

Provocateurs do not punish those who do not share this value. Our job is not to produce automatons spouting “justice rhetoric.” Students will only make a true commitment to justice if they are aware of what it means to think about their role in the delivery of justice. It is only then that they can choose this value in the face of alternatives. We do not have to worry about ensuring that students know that there are many alternative identities that they can embrace as lawyers. If

¹⁵ William S. Moore, *Student and Faculty Epistemology in the College Classroom: The Perry Schema of Intellectual and Ethical Development*, in HANDBOOK OF COLLEGE TEACHING: THEORY AND APPLICATIONS 45, 49 (Keith W. Prichard & C. McLaran Sawyer eds., 1994).

¹⁶ PERRY, *supra* note 7, at 175-77.

¹⁷ Before we arrive at plans for delivering justice, we must be aware of our own limitations and of the evolving nature of insight into justice.

¹⁸ David Gil, a social work teacher, defines critical consciousness in such a way as to embrace justice issues:

Critical consciousness can initiate counterthemes to each major theme of consciousness. It can question and challenge internalized images of ways of life, their institutional systems and consequences, and their customs and traditions. It can reflect on, and transcend conventional wisdom and common sense, and assumptions concerning nature, human nature, and the universe. It can distinguish between real human needs and interests, and socially shaped, perceived needs and interests. And it can generate alternative ideologies and visions of ways of life conducive to the unfolding and actualization of everyone's innate potential, and to the emergence of institutional orders based on social justice and social equality, freedom and genuine democracy, and the affirmation of human life in harmony and nature.

DAVID GIL, CONFRONTING INJUSTICE AND OPPRESSION 48 (1998).

there is one thing with which law school confronts our students, it is the value choice of how they want to be as lawyers. We call this "Career Services." Our problem will be ensuring that the justice alternative is clear. It is not enough to offer public interest commitment as an alternative to corporate practice. We need to assist the student in making an initial commitment to justice as an essential part of their identity as lawyers.¹⁹ We can help them understand the implications of the commitment and the responsibilities that such a commitment imposes.²⁰

Provocateurs share their passion so that students can see the value of such a choice. Provocateurs also validate that a sincere commitment to justice is difficult for virtually any person graced with a professional education.²¹ A commitment to justice is affirmed through multiple responsibilities and is always unfolding throughout one's life.²² Therefore, in addition to teaching our students to be critical thinkers who are active makers of meaning, we must teach in such a way as to have them develop a sensitivity to injustice and learn how to synthesize solutions that move toward justice. We must focus on the student's ability to identify the value conflicts that are a necessary component of a justice-oriented value system.

What things do I want students to consider when thinking about justice? Justice has no absolute meaning because it, too, like all knowledge, is grounded in context. At a minimum, however, those of us who dedicate ourselves to social justice must ask ourselves if our proposed action as a lawyer will support and increase human dignity.²³

¹⁹ See JUSTICE AND CARING: THE SEARCH FOR COMMON GROUND IN EDUCATION (Michael Katz, Nell Noddings & Kenneth Strike eds., 1999).

²⁰ As we all know, many of the students who come to clinic already embrace a justice mission. That does not mean, however, that they appreciate its implications. There is always room for reflection and the interchange between faculty and student that often result in growth for both. On the other hand, lest we think we will get off too easy in our role as provocateurs, it appears that we are getting more and more students attracted to clinic, not because it is a chance to serve the poor or disadvantaged, but rather because it affords the opportunity to gain the skills needed to be an effective lawyer.

²¹ GIL, *supra* note 18, at 50.

²² PERRY, *supra* note 7, at 11.

²³ When I speak of justice, I think of it necessarily affecting power, wealth, well-being, affection, and respect. It is important for us as teachers to be clear about what we mean by "social justice." That theory will inform and shape our practice and provides a framework for what we do and how we do it. One educational theorist offers these goals of social justice education:

The goal of social justice education is full and equal participation of all groups in a society that is mutually shaped to meet their needs. Social justice includes a vision of society in which the distribution of resources is equitable and all members are physically and psychologically safe and secure. We envision a society in which individuals are both self-determining (able to develop their full capacities) and interdependent (capable of interacting democratically with others.) Social justice involves social ac-

We must also educate our students about the obstacles they are likely to face while seeking social justice. Therefore, understanding how oppression manifests itself in the law is critical to the educational process. I assume in my clinic that oppression is pervasive,²⁴ restricting,²⁵ hierarchical,²⁶ complex,²⁷ and internalized.²⁸ Understanding how oppression operates assists in making sense out of many of the phenomena that my students experience. Many of the students in the clinic have given little or no thought to these ideas. Soon enough they will encounter evidence of the effects of oppression in their case handling. It is helpful during our supervision sessions to focus our students on questions such as: "Where do you see resistance to the solution you seek for your client?" and "Who benefits if this solution is denied?"

The step from critical thinking to "justice readiness" cannot be made if we merely rely on the issues that the cases raise. At every point, we must intervene to enhance the experience for our students. At this particular stage of intellectual and ethical development, our interventions should be directed toward uncovering the values that underlie the law, the limits of what law has to offer our clients and the consequences of using law in the particular context in which we operate.²⁹ Perhaps our biggest obstacle to achieving these insights is legal training's pervasive insistence that the law is "neutral."³⁰ The cases we choose are likely to rebut that presumption, but their teaching impact can be enhanced by focusing the student's attention on questions such as: "What are the interests that the client has that underlie the legal problem?" "What options might respond to those interests?" "What are the relative benefits of those options?" "What values underlie the legal solutions to this problem?" "Are those values consis-

tors who have a sense of their own agency as well as a sense of social responsibility toward and with others and the society as a whole.

Lee Anne Bell, *Theoretical Foundations for Social Justice Education*, in *TEACHING FOR DIVERSITY AND SOCIAL JUSTICE*, *supra* note 10, at 1, 3.

²⁴ Oppression is woven throughout social institutions and individual experience. *Id.* at 4.

²⁵ Oppression denotes structural and material constraints that affect a person's ability to develop and be self-determining. *Id.*

²⁶ Oppression is characterized by dominance in which groups are privileged through the subordination of others. I describe how privilege, often in unconscious form, reinforces oppression in a previous article. See Jane H. Aiken, *Striving to Teach Justice Fairness and Morality*, 4 CLIN. L. REV.1, 12-22 (1997).

²⁷ Power and privilege are relative. . .that is to say that they intersect. One might be privileged in one domain but lack privilege in another. Therefore, dealing with oppression is a complex analysis that cuts across multiple relationships. Bell, *supra* note 23, at 5.

²⁸ A critical characteristic of oppression is that it exists not only in external social organizations but also within the human psyche. These oppressive beliefs are internalized by those who are victims of oppression and those who benefit from it. *Id.*

²⁹ Nelson, *supra* note 5, at 175.

³⁰ I have discussed the problem of neutrality in Aiken, *supra* note 26, at 7.

tent with the values of the client?" "What values are reflected in your particular suggested solution?" These questions will assist the student in combating that ingrained notion that the law is neutral (and the playing field is level).

Once we have introduced values as a legitimate source of knowledge and a critical component of lawyerly thinking, we can begin the process of helping our students recognize that they must make choices among conflicting values, and that necessarily means taking "stands."³¹ As provocateurs for justice, we can play critical roles in helping our students make the transition from being able to identify the values content of their choices to making a commitment to social justice.³²

TEACHING TOOLS FOR PROVOCATEURS FOR JUSTICE

We have many tools to help our students focus on justice.³³ Clinical legal education has long valued reflection as a key to effective teaching. Our supervisory questions should be directed to fostering reflection rather than eliciting information.³⁴ As teachers, we must deviate from system-reinforcing behaviors and challenge the students to examine and reflect upon the prevailing social, political, and cultural realities that affect their own and their clients' lives.³⁵ Provocateurs for justice encourage students to engage in this kind of "critical reflection." Critical reflection has at its root an attempt to tease out or hunt down assumptions.³⁶ Perhaps the most powerful tool for lawyers dedicated to social justice is the ability to identify assumptions and expose them. There are essentially three kinds of assumptions that we want our students to be good at identifying: paradigmatic, pre-

³¹ Nelson, *supra* note 5, at 177.

³² This, in essence, is "emancipatory education." Jack Mezirow defines this as "an organized effort to help the learner challenge presuppositions, explore alternative perspectives, transform old ways of understanding, and act on new perspectives." MEZIRROW, *supra* note 3, at 18.

³³ Sue Bryant and Jean Koh Peters have developed a teaching theory and technique that is designed to uncover students' assumptions and open their eyes to the degree to which their own experience colors their perspective in case handling, in what is perhaps the most comprehensive guide available to clinicians for teaching cross-cultural lawyering. Susan J. Bryant & Jean Koh Peters, *Representing the Child-in-Context: Five Habits of Cross-Cultural Lawyering*, in JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 166 (Supp. 2000). The goals of the five habits have the same effect as what I describe as "justice readiness." The suggestions that I make below are mere add-ons to this important work.

³⁴ PATRICIA CRANTON, UNDERSTANDING AND PROMOTING TRANSFORMATIVE LEARNING 169 (1994).

³⁵ Gil, *supra* note 18, at 53.

³⁶ STEPHEN D. BROOKFIELD, BECOMING A CRITICALLY REFLECTIVE TEACHER 2 (1995).

scriptive, and causal assumptions.

Paradigmatic assumptions are perhaps the most difficult to pin down because they are the very structural assumptions we use to put our experience into fundamental categories.³⁷ Many times we see these assumptions as merely facts, the way things are. These assumptions are the most difficult to examine critically because they seem as if they are the bedrock of our understanding. For example, students often believe that if a person is actually innocent, he cannot be legally held in prison. Clinics that do post-conviction work provide eye-opening experiences for students who learn that actual innocence often is not a ground for a habeas petition. Grappling with that offers students the opportunity to explore how the criminal justice system works and the degree to which a defendant's lack of resources at trial is treated as irrelevant in an assessment of post-conviction remedies.³⁸

Identifying paradigmatic assumptions can remedy resistance to clients, and assist in developing case theories. Our clinic represented a female client who was formerly a male and the father of the child who was the subject of the custody dispute. The students prepared for the trial and struggled with their feelings about the problems that our client created for her son by having a sex-change operation. It was not until we were in trial that we fully appreciated the paradigmatic assumptions that we and everyone in the courtroom were making. At base, we treated our client's sex change as a "luxury" rather than a necessity. It was as if our client had decided to spend her afternoons engaging in a hobby rather than working with her child on his homework. Such a choice would not be in the best interests of the child and would pose problems for us in arguing that she was a dedicated mother. We had to confront that assumption and make the court understand that our client's surgery was essential to her as a person and as a parent.

Another paradigmatic assumption operating throughout the case was that a child could not have two biological mothers. The child's guardian ad litem (GAL) argued to the court that the birth mother's extreme reaction and anger at our client (and her insistence on referring to our client as "the freak") was reasonable, given that our client encouraged the child to call her "Mom."³⁹ The students responded by stating clearly that our client *was* a "mom." That is what we call female parents in our society, and she was now a female parent. To insist that she be called Dad or not to be addressed as a parent (by her

³⁷ *Id.*

³⁸ See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000).

³⁹ This GAL's limitations were also revealed by his consistent referral to our client as "he" despite her gender and clear court orders that she was to be referred to as "she."

first name, for example) was to suggest that there was something fundamentally different about her now that she had undergone a sex change.

This triggered another assumption: changing one's sex fundamentally changes the person. The reality for our client and her child is that being a woman was a more accurate picture of who she was. Her basic self, as a parent and person, was the same as it had always been, only now the outward appearance was consistent with the inward feelings. The student pointed out that if the court endorsed the GAL's reasoning, the court would be reinforcing the bias that was causing the child trouble (and had caused the students many hours of anxiety in their representation). The case was rife with paradigmatic assumptions, yet none of those assumptions fit this situation. The students advocated a result that would operate from broader, more complex understandings about our conception of gender and parenting and would limit the court's role in perpetuating bias.

Prescriptive assumptions are what we think ought to be happening in a given situation.⁴⁰ For example, if you take for granted that people are always able to make it on time to pre-arranged appointments if they are sufficiently organized, then you may believe that a client is disorganized and unmotivated if she fails to arrive on time. That prescriptive assumption incorporates an assumption about the availability of transportation and childcare that may not be true for our clients. As provocateurs for justice, we can assist our students in uncovering that prescriptive assumption. Bryant and Peters describe a very effective method for getting at these kinds of assumptions by challenging the students to imagine parallel universes.⁴¹ The teacher asks the student to generate alternative interpretations of a client's behavior. This process allows the student to understand how little the student knows about the client's life, helps forestall a rush to judgment and fosters open-mindedness. It is also a useful device for examining the assumptions that the student was making that contributed to her initial assessment of the client's behavior.

Our Clinic handled a custody case in which we represented a mother who had recently completed her probation after a conviction for child neglect. The client called the students and said that she had had a "bad night" and could not come to her appointment. She was calling from a motel and was penniless, having spent all of her paycheck that she had received the day before. Needless to say, the client's behavior alarmed the students and me. Even the parallel universe techniques met dead ends. We could not generate other, more

⁴⁰ BROOKFIELD, *supra* note 36, at 3.

⁴¹ Bryant & Peters, *supra* note 33, at 226-29.

benign interpretations of what this behavior indicated. The students decided to go to the client and talk with her about getting help for what they concluded was her obvious drug or alcohol problem. What we learned changed our attitude toward the client, cemented our relationship with her, and probably changed our attitude toward all of our future clients. The “bad night” our client had was the following: she had worked late as a grocery cashier and learned as she departed that her father was unable to pick her up because his car had broken down. Our client called all of the friends whom she thought she could awaken, who might drive her the many miles home. None were available. She tried to get rides from others at the store but could not. Finally she called a cab. All she had was her paycheck for \$78 and a bit of cash. Once the cabbie learned that she had no cash for the ride, he dropped her off. She walked to a motel and got a room for the night. After cashing her check at a paycheck cashing place, she paid her bill at the motel, and then was totally without money. She then began the process of trying to find a ride home. This was the day of her appointment, and she called the students from the motel. She had no way to get to the clinic. She did not ask them for a ride; she just said that she had had a “bad night.”

After hearing this story (which was all confirmed), the students and I reflected on our assumptions: about the alcohol or drugs, the lying, irresponsible spending habits, and perhaps even indiscriminate sex. Our prescriptive assumptions about a “bad night” had no relationship to the facts. A focus on “justice readiness” would ask the further question of who benefits from our assumptions. Of what social utility is our immediate assumption? How might it support privilege? Given our assumptions, what assumptions can we expect from decision-makers and how can we educate the decision-maker so to ensure that this fuller, complex picture of our client is revealed?⁴²

The third kind of assumption is causal. These assumptions help us understand how the world works and how we can effectuate change.⁴³ For example, a clinical student acted as guardian ad litem representing a child whose mother was drug addicted. In a supervision session, the student proposed that we should recommend to the court that the mother’s visitation should be conditioned on her active participation in a drug treatment program. If she dropped out, she lost visitation. The student justified this proposal by stating that the mother needed the incentive, and it was in the best interest of the child to have a drug-free mother. No drug treatment, no visits. We then shifted to

⁴² See MIKE ROSE, *LIVES ON THE BOUNDARY: A MOVING ACCOUNT OF THE STRUGGLES AND ACHIEVEMENTS OF AMERICA’S UNDERPREPARED* (1989).

⁴³ BROOKFIELD, *supra* note 36, at 9.

talking about whether this would be best for our client, the child. The student asserted her causal assumption: the reason the mother was a bad parent was because she used drugs.

Causal assumptions are easy to miss in the rush of supervision. It is important to slow the analysis down and identify each step in the assumed chain of cause and effect. The first question in our case was: "What behaviors are you aware of that make this woman a bad mother?" This required the student to evaluate how much factual information she had about the particulars of the client's relationship with her child. In this case, the student had very little information. She had done what anyone operating under a causal assumption does: sees the behavior (using drugs) and attributes behavioral consequences that "necessarily" flow. Our next step was to identify what parenting behaviors we associate with drug addiction.⁴⁴ After listing those, we developed a plan to determine if this mother actually engaged in those deficient parenting behaviors. By exploring the underlying assumptions about the causal connection between being a drug addict and being a bad parent, the student understood how little she actually knew about the cause of the mother's instability. This process improved her ability to do comprehensive fact investigation and be a more effective advocate for the child, who wanted to continue having regular contact with her mother.

Generally, we uncover these assumptions through reflecting with our students on their experiences. We can increase the probability that our students will engage in critical reflection if we mediate that experience through effective questions.⁴⁵ The questions should be specific, work from the particular to the general and be conversational.⁴⁶ It is not enough to ask the student, "what did you think of your performance?" That only elicits a certain kind of reflection. We need to encourage our students to reflect upon the content (what), process (how), and premise (why) of our work. Our questions should be directed toward encouraging the student to think about a situation in a new way, thus creating some kind of disorientation and opening the way for new meaning schemes.⁴⁷

Questions can focus on the discrepancies between the experience

⁴⁴ This often requires a discussion of the many different kinds of drugs we may be referring to when we say "drug addiction" and a recognition that different drugs, even though illegal, will not necessarily have a significant impact on a parent's behavior.

⁴⁵ See Grant WIGGINS & JAY MCTIGHE, *UNDERSTANDING BY DESIGN* (1998).

⁴⁶ STEPHEN D. BROOKFIELD, *DEVELOPING CRITICAL THINKERS: CHALLENGING ADULTS TO EXPLORE ALTERNATIVE WAYS OF THINKING AND ACTING* 92 (1987).

⁴⁷ I explore the educational and justice-related value of the "disorienting moment" in Aiken, *supra* note 26, at 23-30.

and the theoretical positions related to that experience.⁴⁸ For example, in a domestic violence clinic, students learn that a victim of violence can procure an order of protection to keep her abuser away. It does not take long for students to learn that the order of protection is merely a piece of paper and provides little peace of mind for a woman subsequently stalked by her abuser. The clinical teacher can mine that experience for its “justice insight.” We can start with the “what” questions, moving from the specific to the general: “What assumptions did the student make about the usefulness of the order of protection?” “What assumptions are implicit about the role of law in this situation?” Next, we move to the “how” questions: “How did we arrive at the decision to seek an order of protection?” “How does the legal system respond to the deficiencies in the protection remedy?” Finally, we can move to the “why” questions: “Why is an order of protection ineffective in this case?” “Why did we believe that this was the most appropriate solution for this client?” Of course, assisting the student in gaining insight into the legal system’s failure to address the needs of women who are victims of violence is not enough if we want to be provocateurs for justice. Our next questions must focus on action planning and critical self-reflection: “What would you do next time in this situation?” “How have your assumptions about the efficacy of the legal system affected your ability to address the larger problems you have identified?” “What role can you play in dismantling the structure of this injustice?”

If discussions are slow to start, we can assist by identifying an engaging event, assigning a provocative reading, or creating an activity in which the students must use these critical assessment skills. One method is using “critical incident” exercises.⁴⁹ The instructor asks the student to identify an event that for some reason is of particular significance to the student. Usually the instructor identifies some criteria for choosing the incident. I have found that asking students to identify events that have occurred with clients or the legal system that surprised them, because things were not as they expected, reap meaningful events for reflecting upon justice issues. First, the students are asked to write a short (one or, at most, two paragraph) description of the event. The description should be as specific as possible, focusing on the particular action rather than abstract concepts. I use these reports to develop hunches about what assumptions the student is

⁴⁸ For a compelling example of this see Mona Taylor Phillips, *Case Study 7: A Case Study of Theory, Voice, Pedagogy, and Joy*, in *OPENING LINES* 73 (Pat Hutchings ed., 2000).

⁴⁹ Critical incident exercises are hardly new. They have been used in the social sciences and education for over forty years. See generally Brookfield, *supra* note 46.

making.⁵⁰ I then can ask the student to reflect on their assumptions when I give the student feedback. Because these incidents are written, the student retains some privacy. Discussion of internal biases is often difficult in front of peers. The critical incident exercise is best used in one on one discussions about justice.

One of my students handling a domestic violence clemency case wrote about a critical incident for her. She had interviewed the client and had her recount the murder of her husband. The woman had used a gun and her husband had been sitting in a chair, unarmed at the time of the killing. She had pled guilty to the murder and described herself as deeply remorseful for killing her husband and said she “just didn’t know why [she] did it.” When the student probed the client about domestic violence, the woman described the violence as minor. The student left the interview puzzled by why the clinic was taking this woman’s case. She then made the trip to the client’s hometown, where she interviewed neighbors, family members, and the sheriff who had arrested her. She was “surprised” to learn that the abuse had been substantial and prolonged. The sheriff even said that “she did us all a favor” because this man had been such a bad actor in the community. The student later learned that the pre-sentence report had recommended no time, but the client’s lawyer had pled her to 20 years. The student’s description of the “facts” that led her to be surprised opened the door for me to probe the assumptions the student had made about people convicted of crimes, victims of violence, even lawyers who plead their clients because they lack funds for trial. It was not enough to leave that student with the experience. She needed faculty intervention to focus on the experience, analyze its implications for her case handling, and, perhaps most important, analyze the value choices she made at each point in the process.

Another technique to assist students in understanding their assumptions and the assumptions that underlie the law is “criteria analysis.”⁵¹ Criteria are the bases on which we evaluate worth and merit. They are necessarily value-laden. As lawyers we are always applying criteria to cases: Does this case fit our selection criteria? What criteria will the court use to determine if our client is a good risk for bail? What criteria will this agency use to determine if our client is disabled? What criteria did the employer use to decide whether to hire this individual? Criteria often appear objective but they are inevitably subjective and thus offer rich fodder for students to examine assumptions, norms, and values. When we ask students to engage in criteria analysis, we are asking them to make explicit those judgments

⁵⁰ *Id.* at 99.

⁵¹ *Id.* at 100.

that underlie the criteria. A key component of criteria analysis is to ask them to identify the behavioral indicators that show that the criteria have been met. For example, in child protection cases, it is often helpful to have students identify the criteria they will be using to distinguish poverty from neglect, when assessing whether the parent in question has been neglectful. This analysis requires the student to think about the behavioral consequences of poverty, the standards that child protection has for what it means to be a good parent and how much those standards and judgments assume access to money and resources.

Other techniques include role-playing in which the student is encouraged to play the role of the client. After simulating an interview or counseling session, participants can discuss the experience. Questions that are likely to lead to insight about alternative perspectives include, "When you were the client, what were you thinking or feeling?" "How did you come to that reaction?" "Why is this important?"⁵² Some clinicians begin the clinic as many of us do with an exercise in which the students interview one another and then "introduce" that student to the class. This exercise offers a beginning opportunity to teach the student about interviewing. We do not need to stop there, however. We can use this exercise as an opportunity to discuss how each person felt about not speaking for him or herself.⁵³ I probe whether they felt as if an accurate picture was provided and whether they felt "present." I remind them that this is what happens with clients when we speak for them in court. This exercise, offered on the first day of class, begins the process of having the students step into the client's shoes. This beginning exercise opens the door for future experiential exercises in which the client's reaction to the lawyering, not just the lawyering skill, is treated as an important part of being an effective lawyer.

It is not enough to look at each individual case for its possibilities for teaching about justice. We need to look at the bigger picture as well. We should encourage our students to evaluate whether the legal options that we offer our clients are merely designed to reduce the intensity of the injustice or whether they assist in a long-term strategy of social transformation. If our legal work is merely a short term solution to our clients' problems, our discussion should move on to activi-

⁵² PATRICIA CRANTON, UNDERSTANDING AND PROMOTING TRANSFORMATIVE LEARNING 175 (1994).

⁵³ I learned this extension of the exercise from Steve Wizner who learned it from Jean Koh Peters. He thinks perhaps she learned it from someone else. This only points out the ways in which much of what we actually do pedagogically as clinicians is passed along in the oral tradition. We need to write more about our teaching methods.

ties in which we can work toward the elimination of the structures of injustice. We need to create occasions for discourse on the essential attributes of just societies. By making that space, we communicate the importance of social justice, the opportunity to make a difference that their law degree creates, and the responsibility that they bear as lawyers for the delivery of justice in our society.

CONCLUSION

As educators in a professional school, we are in the business of providing credentials to the elite and thereby reinforcing the ideological justification for oppressive social orders. We need not fulfill that role. Instead, we can transform our practices so that we can be provocateurs for justice. It is not enough to use our legal skills and our students to fight for justice. As clinicians, we have made a commitment to justice through our role as educators, not front-line lawyers. This means that we must hone our skills as educators to ensure that the future lawyers we are training have an appreciation for justice and work to inspire them to use their legal skills to bring about a more just society. We have done too little to map how we can actually accomplish this goal. We need to work together to discuss appropriate projects for students, to develop teaching interventions that move us closer to the goal of inspiring students to embrace the justice role they can play as lawyers, and to support and affirm one another in this difficult endeavor. To say clinics should have a social justice mission should prompt a conversation about how we teach our students to develop a consciousness of their socially shaped realities and to recognize their potential to be creative, to be productive, and to effectuate change in society. We can assist our students to make a commitment to justice in their lives as lawyers. We just need to refine our tools.